UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

ALFONSO BOROM, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 2:07-CV-98 JVB
	)	
TOWN OF MERRILLVILLE, et al.,	)	
	)	
Defendants.	)	

OPINION AND ORDER

This matter is before the Court on Defendants Town of Merrillville ("Town"), Stephen Bower, Timothy A. Brown, John Christos, Mabel Gemeinhart, Richard Hardaway, Lance Huish, Tris A. Miles, Catheron Paras, Shawn Pettit, Joseph Shudick, Bruce Spires, Drew Sterley, Andrew Sylwestrowicz, Terrell Taylor, David M. Uzelac, and Ronald Widing's ("Town Defendants") Motion for Summary Judgment [DE 432] and Plaintiffs' Motion to Strike [DE 485].

Plaintiffs brought a six-count complaint against thirty-one defendants, including the Town and several of its officials and staff. Plaintiffs seek injuctive relief for an order requiring all Defendants to abate the nuisance in Innsbrook. Additionally, Plaintiffs bring claims of breach of implied warranty of habitability, negligence, damages under the Indiana RICO statute, and damages pursuant to the Indiana Crime Victims Act. Finally, Plaintiffs allege a Fourteenth Amendment claim, pursuant to 42 U.S.C. § 1983, against the Town and the Town Defendants in both their official and individual capacities. This order pertains only to Plaintiffs' § 1983 claim.

A. Summary Judgment Standard

A motion for summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Rule 56(c) further requires the entry of summary judgment, after adequate time for discovery, against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

A party seeking summary judgment bears the initial responsibility of informing a court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If the moving party supports its motion for summary judgment with affidavits or other materials, it thereby shifts to the non-moving party the burden of showing that an issue of material fact exists. *Keri v. Bd. of Trust. of Purdue Univ.*, 458 F.3d 620, 628 (7th Cir. 2006).

Rule 56(e) specifies that once a properly supported motion for summary judgment is made, "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts to establish that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

In viewing the facts presented on a motion for summary judgment, a court must construe all facts in a light most favorable to the non-moving party and draw all legitimate inferences and resolve all doubts in favor of that party. *Keri*, 458 F.3d at 628. A court's role is not to evaluate the weight of the evidence, to judge the credibility of witnesses, or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. *Anderson v. Liberty Lobby*, 477 U.S. 242, 249–50 (1986).

B. Facts

Having read all the evidence filed in this case, the Court finds the following facts pertinent to the Town and Town Defendants' motion for summary judgment: Plaintiffs are twenty African-American residents and one hispanic homeowners of Innsbrook, a residential subdivision in Merillville, Indiana. Plaintiffs' claims stem from what they characterize as a faulty retention pond and storm water system that has caused significant flooding and damage to their homes. Among other claims, Plaintiffs allege that the Town wrongfully denied their request to have the Innsbrook retention pond issue placed on the Town Council's meeting agenda, and failed to enforce Town code provisions against developers of the subdivision, all because of their race, in violation of their equal protection rights under the Fourteenth Amendment.

In their Second Amended Complaint [DE 230], Plaintiffs allege that "[i]n the administration by the aforementioned Defendants, in subdivisions whose residents are primarily Caucasian, the developers of those subdivisions were subject to strict design requirements for the retention pond and drainage systems while the Plaintiffs, who are residents of Innsbrook Units 5, 6, and 7, whose residents are primarily African-American, were denied those benefits by the Town." (DE 230 at 28). They further contend that the Town maintained retention pond located in subdivisions whose residents are primarily Caucasian but refused to maintain the retention pond in Innsbrook. Plaintiffs state that they have "made ongoing attempts to receive equal protection of the law . . . but their attempts have proven futile." (*Id.* at 29).

Plaintiffs contend that at a Town meeting on March 10, 2005, "the Town lied to the residents . . . , suppressed their free speech, and tried to make residents form a homeowner's association so the homeowners themselves would pay for the defective drainage." (DE 504 at 5). Additionally, Plaintiffs maintain that they were "verbally harassed and intimidated," (*Id.*) presumably by the Town Defendants.

On the other hand, Plaintiffs maintain, residents of Southmoor, a Caucasian neighborhood, petitioned the town because they worried that the construction of a new subdivision, Madison Meadows, would affect traffic and drainage in their subdivision. In Southmoor's case, the Town ordered Craig Van Prooyen, the developer of Madison Meadows, to provide information to the Town from a traffic study. Plaintiffs contend that when the Town inspected Madison Meadows, it found ordinance violations and made Van Prooyen correct them. According to Plaintiffs, the Town also required Van Prooyen to install fences when he developed Madison Meadows, and it "threatened to take action when Van Prooyen's performance bond expired but did not require the performance bond from [the developer of] Innsbrook." (DE 504 at 6). Finally, because the Southmoor residents' sump pumps were constantly running, the Town required Van Prooyen's plans for Madison Meadows to include a plan to alleviate the sump pump problem.

C. Analysis

(1) Plaintiffs' Claims Against the Town Defendants in their Individual Capacities

The Court will first determine whether Plaintiffs' § 1983 claims against the Town Defendants in their individual capacities can survive summary judgment. Establishing a deprivation of the equal protection clause requires plaintiffs to prove that the defendants' actions (1) had a discriminatory effect and (2) were motivated by a discriminatory purpose. *Chavez v. Ill. State Police*, 251 F.3d 612, 635–36 (7th Cir. 2001) (citing *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272–74 (1979); *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 264–66 (1977); *Washington v. Davis*, 426 U.S. 229, 239–42 (1976)). To prove discriminatory effect, plaintiffs must show "that they are members of a protected class, that they are otherwise similarly situated to members of the unprotected class, and that plaintiffs were treated differently from members of the unprotected class." *Chavez*, 251 F.3d at 636 (citing *Greer v. Amesqua*, 212 F.3d 358, 370 (7th Cir. 2000); *City of Fort Wayne*, 91 F.3d 922, 944–45 (7th Cir. 1996)). A similarly situated individual may be identified either by naming an individual (or group of individuals) or through the use of statistics. *Id.* (citing *United States v. Armstrong*, 517 U.S. 456, 467 (1996)).

When a plaintiff attempts to name an individual or a group as a similarly situated individual or group, a court is required to "'look at all relevant factors, the number of which depends on the context of the case.'" *Chavez*, 251 F.3d at 636 (quoting *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 617 (7th Cir. 2000)). The Court of Appeals for the Seventh Circuit has noted that the similarly situated requirement is most often discussed in employment discrimination cases, and "these discussions are rarely extensive and do not provide any magic formula for determining whether someone is similarly situated." *Id.* In this case, relevant factors include the sizes of the subdivisions (both geographically and by number of residents), the racial makeup of the residents, the existence of structural similarities in the homes involved, the infrastructure of the neighborhoods, and the zoning status of the subdivisions.

Aside from naming a similarly situated group, plaintiffs may also use statistics to show that defendants treated them differently than other similarly situated individuals. In that case, "the statistics proffered must address the crucial question of whether one class is being treated differently from another class that is otherwise similarly situated." *Chavez*, 251 F.3d at 638 (citing *Schweiker v. Wilson*, 450 U.S. 221, 233 (1981).

Plaintiffs are able to satisfy the first prong of the analysis because they are African-American and Hispanic-American, both protected classes. *See Bio v. Fed. Express Corp.*, 424 F.3d 593, 597 (7th Cir. 2005); *Velez v. City of Chi.*, 442 F.3d 1043 (7th Cir. 2006). However, Plaintiffs are unable to establish a class of similarly situated individuals. Plaintiffs contend that the Town maintains other ponds at "Sedona, Bon Aire Lake, Broadfield and 93rd Avenue." (DE 504 at 13). Plaintiffs also point to other neighborhoods in Merrillville that the Town has assisted in alleviating flooding problems: Vermont Acres, in which the Town built an "earthen dyke" to alleviate flooding, and Broadfield, in which the Town helped pay for a study to determine its source of flooding. *Id.* Ultimately, however, Plaintiffs contend that the Caucasian residents of Southmoor (whom Plaintiffs also identify as the "remonstrators for Madison Meadows") are similarly situated to them:

> Plaintiffs have proven that remonstrators for Madison Meadows are similarly situated to the Plaintiffs. The development of Madison Meadows affected the Southmoor residents' property. They showed up at Plan Commission meetings to complain that the development of Madison Meadows affected their property. Innsbrook residents showed up at Plan Commission meetings to complain. When Plaintiffs were at the meetings, they were ignored. When the Southmoor residents were at the meetings, they were not ignored, and they got their results.

(DE 505 at 7–8). Plaintiffs do not attempt to establish a similarly situated class through the use of statistics.

Yet, none of these facts identified by Plaintiffs show similarities between the two communities. Beyond stating that Plaintiffs are African-American and Hispanic and the Southmoor residents are Caucasian, Plaintiffs do not provide a detailed analysis of the racial makeup of the residents of the two neighborhoods. Likewise, Plaintiffs provide no specifics as to the geographical sizes of the subdivisions, the total number of residents living in each community, the existence of structural similarities in the homes involved, the infrastructure of the neighborhoods, or the zoning status of the subdivisions. Finally, Plaintiffs do not provide the Court with any evidence, at minimum, that the Southmoor neighborhood is located in the Town of Merrillville. Although Plaintiffs attempt to compare the two neighborhoods by showing that the Southmoor residents were successful in having their requests granted when they attended Town Hall meetings while Plaintiffs were not, this contention more appropriately serves to fulfill the third requirement of the test: "that plaintiffs were treated differently from members of the unprotected class." *Chavez*, 251 F.3d at 636.

Because Plaintiffs are unable to identify a similarly situated class, they have failed to demonstrate that the Town Defendants' actions had a discriminatory effect, which was necessary for Plaintiffs to establish a deprivation of their Fourteenth Amendment rights. *See Celotex*, 477 U.S. at 322 (summary judgment must be entered against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."). Therefore, summary judgment is granted in favor of the Town Defendants in their individual capacities.

(2) Plaintiff's § 1983 Claims against the Town and the Town Defendants in their Official Capacities

Municipalities are subject to suits brought pursuant to 42 U.S.C. § 1983. However, a municipality's liability under § 1983 must first be tested by the requirements dictated by the United States Supreme Court in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). In *Monell*, the Court held that municipalities may be subject to § 1983 suits if the "action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* at 691. Success on a § 1983 claim necessarily requires establishing that a constitutional violation occurred, and as previously discussed, Plaintiffs are unable to do so. Even if Plaintiffs were able to establish a constitutional violation, their claims against the Town would fail because Plaintiffs did not show their constitutional rights were violated by an official municipal policy. *See Wragg v. Village of Thornton*, 604 F.3d 464, 467–68 (7th Cir. 2010).

Likewise, Plaintiffs' claims against the Town defendants in their official capacities would fail. Official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). A suit against an officer in his or her official capacity "is not a suit against the official as an individual; the real party in interest is the entity." *Wilson v. Civil Town of Clayton*, 839 F.2d 375, 382 (7th Cir. 1988). Therefore, plaintiffs who seek to recover in an official-capacity suit "can only look to the entity itself, not to the official." *Id.* (citations omitted). Accordingly, summary judgment is granted in favor of the Town on Plaintiffs' claims against the Town and the Town Defendants in their official capacities.

D. The Court's Supplemental Jurisdiction over Plaintiffs' State-Law Claims

Having ruled in favor of the Town Defendants on the sole federal claim in this case, Plaintiffs' § 1983 claim, the Court must decide whether to remand the remaining claims, all based on state-law, to state court. The Town Defendants urge the Court that, if the Court rules on Plaintiffs' § 1983 claims in their favor, it should continue to exercise jurisdiction over the pendant state-law claims in this case. In support of their proposition, the Town Defendants contend that the extensive nature of this case warrants the Court continuing its jurisdiction:

> [T]he parties have conducted significant discovery in the matter, in which over fifty depositions were taken to address claims asserted by twenty-one plaintiffs against over twenty-five defendants. It is important to note that the defendants filed dispositive motions early on in this matter on some of the plaintiffs' claims, and these motions were denied without prejudice, as this court determined that discovery needed to be conducted to fully consider the issues.

(DE 434 at 56).

Federal district courts have "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a). In their discretion, "district courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). A district court has broad discretion in deciding whether to continue to exercise jurisdiction over supplemental claims. *See Hansen v. Bd. of Trs. of Hamilton Se. Sch. Corp.*, 551 F.3d 599, 608 (7th Cir. 2008) (citations omitted). At each stage of the litigation, in deciding whether to retain jurisdiction pursuant to § 1367(c), the district court "should consider and weigh . . . the values of judicial economy, convenience, fairness, and comity." *City of Chi. v. Int'l College of Surgeons*, 522 U.S. 156, 173 (1997) (citations and quotations omitted). "When all federal claims have been dismissed prior to trial, the principle of comity encourages federal courts to relinquish supplemental jurisdiction pursuant to § 1367(c)(3).” *Hansen*, 551 F.3d at 608.

Having weighed the values of judicial economy, convenience, fairness, and comity, and in its discretion, the Court declines to continue to exercise supplemental jurisdiction over Plaintiffs’ state-law claims in this case. Of the six counts in Plaintiffs’ Second Amended Complaint, five state-law claims remain. These claims, solely involving Indiana law, are more appropriately decided by Indiana courts. The case is remanded to state court.

E. Plaintiffs’ Motion to Strike

The Court now turns to Plaintiffs’ Motion to Strike. In their motion, Plaintiffs move to strike a number of the Town Defendants’ exhibits:

> [P]aragraph two, entitled Thomas Burke’s Evaluation of the Pond and Storm Water System and His Opinions, Document Number 447, . . . and Exhibits 43, 44, 45, and 46, that are excerpts from the Burke Deposition, the Expert Report of Burke, REL’s Expert Witness Disclosures, [and] the Town of Merrillville’s Expert Witness Disclosures.

(DE 485 at 1). In support of their motion, Plaintiffs contend that these “opinions and exhibits should be stricken because they are nothing more [than] legal opinions and legal conclusions that do not require any specialized scientific knowledge to assist the trier of fact.” (DE 485-1 at 1–2). The portions of the Town’s exhibits that Plaintiffs identify in their motion were not related to Plaintiffs’ § 1983 claim, and since the Court has declined to continue to exercise supplemental jurisdiction over Plaintiffs’ remaining claims, the Court need not rule on Plaintiffs’ motion to strike.

F. Conclusion

For the foregoing reasons, summary judgment is GRANTED as to Plaintiffs' 42 U.S.C. § 1983 claims against Defendants Town of Merrillville, Stephen Bower, Timothy A. Brown, John Christos, Mabel Gemeinhart, Richard Hardaway, Lance Huish, Tris A. Miles, Catheron Paras, Shawn Pettit, Joseph Shudick, Bruce Spires, Drew Sterley, Andrew Sylwestrowicz, Terrell Taylor, David M. Uzelac, and Ronald Widing. The case is remanded to state court.

SO ORDERED on December 2, 2010.

s/ Joseph S. Van Bokkelen
JOSEPH S. VAN BOKKELEN
UNITED STATES DISTRICT JUDGE